

**3799. Misbranding of macaroni. U. S. v. 267 Boxes of Macaroni. Tried to the court. Judgment for the United States of America, libellant. Decree of condemnation and forfeiture. Product ordered released on bond.** (F. & D. Nos. 6168, 6169. I. S. Nos. 825-k, 1381-k. S. No. E-175.)

On December 11, 1914, the United States attorney for the Western District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 267 boxes of macaroni, remaining unsold in the original unbroken packages at Pittsburgh, Pa., alleging that the product had been shipped on or about November 7 and 14, 1914, and transported from the State of New York into the State of Pennsylvania, and charging misbranding in violation of the Food and Drugs Act. The product was labeled: "Gusto Igiene Nettezza Pastificio Moderno Elettrico Con Prosciugazione Artificiale Vitello Brand Torre Annunziata (Italy Method) Mfg. U. S. A." In addition the label bore pictorial representations of three persons, a dining scene, etc. Boxes were also branded by means of rubber stamp "20 lb. net artificially colored."

Misbranding of the product was alleged in the libel for the reason that it was labeled and branded so as to deceive and mislead the purchaser; that is to say, the appearance and construction of the label conveyed the impression that the goods were of foreign manufacture and this effect was not cured by the statement in minute type on the bottom of the label, "Mfg. U. S. A."

On December 28, 1914, Thomas Monico and August E. Alles, partners, doing business as Monico-Alles Company, New Castle, Pa., claimants, filed their answer, denying the material allegations in the libel.

On February 17, 1915, the case having come on for trial before the court, after the submission of evidence and argument by counsel, the court found the product misbranded and ordered its condemnation, but provided that the same might be released to said claimants upon filing of bond, in conformity with section 10 of the act and the payment of costs, as will more fully appear from the following opinion by the court (Thomson, J.):

The libel in this case was for the seizure and condemnation of 267 boxes of macaroni, remaining unsold in the original, unbroken packages at Pittsburgh, Pa. The libel alleges that the product was shipped by the Dunkirk Macaroni & Supply Co. of Dunkirk, N. Y., and transported from the State of New York; and charges that the same was misbranded, in violation of section 10 of the Pure Food and Drugs Act, as defined in subsection 2, which defines what usually may be considered as misbranding of foods under the act of Congress.

The said food product was seized by the United States marshal in the possession of certain parties in Pittsburgh, Pa.; and was claimed by Thomas Monico and August E. Alles, partners doing business as Monico-Alles Co., who answered, and were made parties to the proceedings by the execution of bond in accordance with section 26 of the admiralty rules of this court.

The libel sets forth a copy of the label on each of the boxes of the macaroni so seized, as follows:

"Gusto Igiene Nettezza Pastificio Moderno Elettrico Con Prosciugazione Artificiale Vitello Brand Torre Annunziata (Italy Method) Mfg U. S. A."

In addition the label bears pictorial representations of three persons, a dining room scene, etc.; and boxes are branded by means of a rubber stamp, "20 lb net artificially colored."

The libel also points out specifically the respect in which the product was misbranded as follows:

"That said product, so designated as aforesaid, as analyzed by the Bureau of Chemistry, Department of Agriculture, United States of America, is shown to be misbranded in violation of said act of Congress, commonly known as the Food and Drugs Act, in that it is labeled and branded so as to deceive and mislead the purchaser; that is to say, the appearance and construction of the label conveys the impression that goods are of foreign manufacture, and this effect is not cured by statement in minute type on bottom of label, 'Mfg U. S. A.'"

The answer filed admits the material facts and allegations contained in the libel, except that it is denied that the macaroni is misbranded. The question thus raised

is whether the product was misbranded, i. e., labeled so as to mislead the purchaser by conveying the impression that the goods are of foreign manufacture. The language of section 8, subsection 2 [in case of food(?)], of the act of Congress, is: "If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so." Some testimony was offered on behalf of the Government, by persons familiar with the trade, to the effect that the label would mislead the average purchaser by conveying the impression that it was a foreign product. Some evidence was also offered by the respondents that it would not convey that impression.

The court must determine the issue mainly by an inspection of the label itself. It has been held that it is not important whether the manufacturer did or did not intend to deceive. The purpose of the act is to protect the people from deception by selling him one thing when the purchaser desires to purchase another. The intention of the maker is therefore not an element in the case. (*U. S. v. 36 Bbls. of London Dry Gin*, 210 Federal Reporter, 271; *McDermott v. Wisconsin*, 228 U. S., 115.) Turning to the label itself, we find from its appearance that it is very distinctly Italian. The label proper is of the dimensions of  $8\frac{1}{2}$  inches by  $6\frac{1}{4}$  inches, bearing pictorial representations of three persons, a dining scene, etc., with a very narrow white margin, from one-eighth to one-sixteenth of an inch in width. The name of the manufacturer and the place where the macaroni is made do not appear. Nearly all of the wording on the label proper is in the Italian language. The exceptions are in the use of the words "Vitello Brand" and "Italy Method." Between the words "Vitello" and "Brand" is the picture of a cow or calf. The testimony shows that the word "Vitello" is the Italian word for calf. The words "Torre Annunziata" are the name of a city in Italy where it appears macaroni is extensively manufactured. There is no doubt that the general purchaser, looking at that label, with its distinctly Italian caste and written in the Italian language, with nothing whatever thereon to indicate that it was of American manufacture, would at once conclude that it represented a foreign, and, in this case, an Italian product. It is claimed that the letters "Mfg. U. S. A." in small type within less than an inch of space, on the very narrow white margin on the lower edge of the label, would be notice to the purchaser of the fact that the product was manufactured in America.

It seems clear to the court that the makers did not intend bona fide to convey such notice to the purchaser by the use of these letters; but rather that they were endeavoring to protect themselves from the charge of violating the act of Congress. If it was intended that the purchaser should be informed as to where the food product was manufactured, certainly some words sufficiently conspicuous would be placed upon the label to strike the eye of the purchaser and convey the desired information. I do not think that the letters on the margin which I have quoted save the label or brand from the charge that it deceives and misleads the purchaser, and purports to be a foreign product when not so.

The court therefore finds and decrees as follows:

1. That this court has jurisdiction in this case and of the respective parties;
2. That on the 11th day of December, A. D. 1914, the United States of America, by E. Lowry Humes, its attorney, filed a libel in this court against Two Hundred and Sixty-seven Boxes of Macaroni, and that forthwith a monition was issued to the United States marshal for the Western District of Pennsylvania, under which monition thirty-three boxes of macaroni were seized in their original packages while in the possession of A. Guilano & Sons, at No. 27 Chatham Street, Pittsburgh, in the State of Pennsylvania, and one hundred and thirty-one boxes of macaroni were seized in their original packages while in the possession of V. M. Di Giorno, at 810 Webster Avenue, Pittsburgh, in the State of Pennsylvania, in the district aforesaid, and by virtue of the said monition and seizure the said macaroni is now in possession of the United States marshal at Pittsburgh, in the district aforesaid.
3. That the claimant has admitted in its answer to the libel against the goods aforesaid that Thomas Monico and August E. Alles, partners doing business as Monico-Alles Company at New Castle, State of Pennsylvania, are the owners of the goods so seized as aforesaid; that the said goods so seized were shipped from Dunkirk, in the State of New York, to Pittsburgh, in the State of Pennsylvania, and that the one hundred and sixty-four boxes of macaroni composing the interstate shipment aforesaid were in possession of A. Guilano & Sons, at 27 Chatham Street, Pittsburgh, and V. M. Di Giorno, at 810 Webster Avenue, Pittsburgh, in said district, at the time of the said seizure, and held by the said parties for sale.
4. That the case coming on for trial January 29, A. D. 1915, before the court upon stipulation filed by counsel waiving the right of trial by jury, and agreeing that the case should be determined by the court without a jury, upon the single issue joined as to whether the one hundred and sixty-four boxes of macaroni, labeled "Gusto Igiene Nettezza Pastificio Moderno Elettrico Con Prosciugazione Artificiale Vitello

Brand Torre Annunziata (Italy Method) Mfg U S A," and bearing a pictorial representation of three persons, a dining scene, etc , and also branded by means of rubber stamp, "20 lb net artificially colored," composing the interstate shipment aforesaid, and filled with an article of food called macaroni, were misbranded in manner and form as alleged in the said libel. The said court, after hearing all the evidence and argument of counsel, adjudged that the said macaroni was misbranded as alleged in the libel, and in violation of the said act of Congress of June 30, 1906.

5. It is therefore adjudged and decreed that the said one hundred sixty-four boxes of macaroni, composing the interstate shipment aforesaid, are misbranded within the terms of section 8 of the Food and Drugs Act of the United States, enacted by the Congress of the United States June 30, 1906, and the same are hereby declared to be forfeited and confiscated to the United States; and

It is further ordered, adjudged, and decreed, in lieu of the sale of the said property above described, as provided by section 10 of the Food and Drugs Act of the United States aforesaid, that upon the payment of all the costs of this libel proceeding, and the execution and delivery within ten days from this date hereof of a good and sufficient bond by the claimant, and surety to be approved by this court, or in the absence of the court by the clerk thereof, in the sum of two thousand dollars, conditioned that said claimant or claimants, his or their agent or attorneys, shall not dispose of the said macaroni, composing the shipment aforesaid, in violation of the act of Congress, enacted June 30, 1906, known as the Food and Drugs Act of the United States, or against the laws of any State, Territory, or insular possession of the said United States, the said two hundred and sixty-seven boxes of macaroni, or the portion of said shipment now in the hands of the United States marshal, to wit, one hundred and sixty-four boxes of macaroni, to be surrendered to the said claimant.

In accordance with the foregoing opinion, the product was thereafter released to said claimants.

CARL VROOMAN, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *May 8, 1915.*